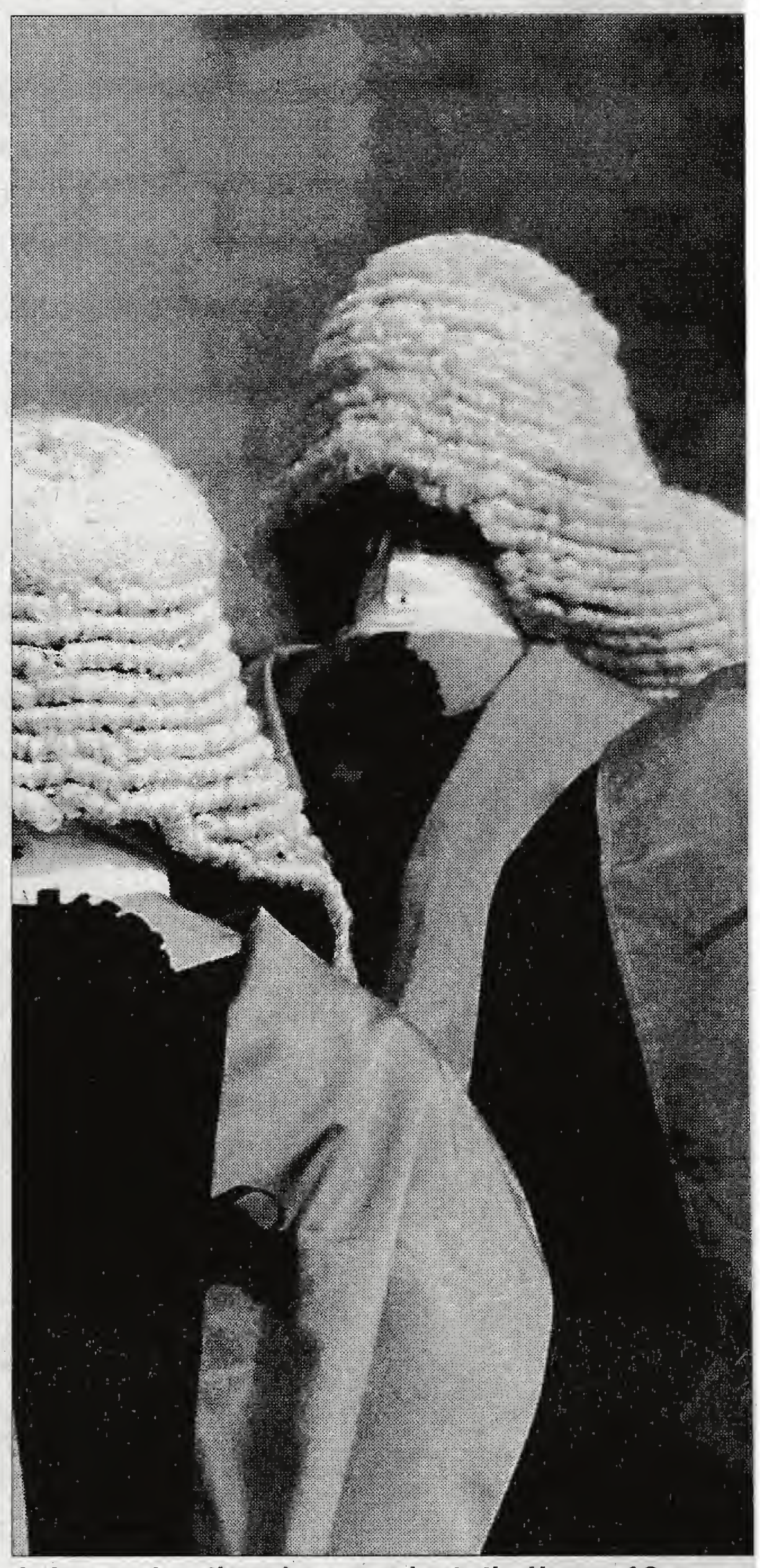
Rights of the citizen

Power shifts to the judges

British law will next month adopt the European convention on human rights. On this page we look at the role the judiciary will play in the ensuing challenge to parliamentary authority. Opposite we look at likely areas of conflict



Judges such as these in procession to the House of Commons

Alan Travis and **Clare Dyer**

It has always been at the heart of the English libertarian tradition that citizens can do whatever they like unless it is specifically banned by parliament.

When the Human Rights Act comes into force next month this will not change for the individual citizen, but for the first time government ministers and public bodies will find themselves having to operate within a set of agreed minimum standards which can be enforced by British judges. The courts will have much more power than before to hold the government and public bodies to account.

But how enthusiastically will the judges stride out into the new human rights landscape? Will they flex their muscles at the expense of parliament, the people's elected representatives?

From October 2, the act will incorporate the European convention on human rights into UK law, making rights enforceable in the UK courts which could be invoked previously only by a long, hard slog to Strasbourg. The task will be a wholly new one for judges used to poring over and interpreting the strict wording of statutes. They will now be asked to give effect to a broad brush bill of rights. In many cases, precedents of the UK courts, so carefully followed in the past, will become irrelevant.

Critics of the Human Rights Act complain that this new power for the British courts to interpret the European human rights convention to protect individuals against abuses of power by elected politicians or public officials involves a significant erosion of the power of parliament. The former Tory home secretary, Michael Howard, argued that balancing individual rights against the exercise of power on behalf of the community at large often involved difficult judgments better made by politicians accountable to the voters than by unelected judges who cannot be dismissed.

But the record of parliament, not to mention home secretaries, is not so exemplary when it comes to safeguarding the rights of less popular minorities, such as prisoners, asylum seekers, travellers and gays. Much of the impetus behind the convention was to ensure that minority rights would not be trampled on by the majority.

Some leading Tory figures such as Lord Hailsham and Lord Brittan strongly supported the convention's incorporation over the years. But William Hague's party has already begun to attack the change, claiming it will shift legislative power from parliament to the judges and that their more controversial judgments will lack the support of the public. They argue that incorporation will "weaken our accountable democratic traditions".

One major factor in Labour's conversion to the act was the "elective dictatorship" under Margaret Thatcher during which key senior Labour figures overcame the party's traditional hostility to "Tory judges" and came to believe that the courts could provide an essential check against an overweening executive.

That check contained in the minimum standards set out in the human rights convention will apply not only to the government but to all bodies discharging a public function. It means that private prison companies will have to operate to a minimum set of standards. The courts are also considered a public body, so the convention could be breached if, for instance, an individual had no redress for invasion of privacy by a newspaper.

There will be cases in which the judges will have to tread a fine line between the interests of the community, as defined by parliament, and those of the individual who might be bringing the human rights challenge. The question then is who takes precedence — parliament or the judges?

The government has drafted the Human Rights Act to ensure that the courts cannot strike down acts of parliament agreed by elected MPs. What the judges will be able to do is

> In many cases, precedents so carefully followed in the past will become irrelevant

s face a new legal landscape in which they will have much more power to hold ministers to account Photograph: UPP

to issue a declaration that a statute is incompatible with the European convention.

Lord Lester QC, one of the key architects of the Human Rights Act, says that this will leave it to the government and parliament to decide whether to amend the offending legislation or to defend the case before the European court of human rights in Strasbourg. The aggrieved citizen will still have the option of taking the case to Strasbourg if no action is taken to change the law. "It will be for government and parliament to decide whether to accept the judicial verdict," says Lord Lester.

The legal principle that parliament still rules was set out this year in the Kebilene case in which Lord Steyn, a law lord, said in a House of Lords judgment: "It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty. In a case of incompatibility of interpretation under section 3(1), the courts may not disapply the legislation."

Those who advocate incorporation argue that this gets around the problem of giving more power to unelected judges. Because MPs will have the last say and citizens can lobby their MPs, they can do something about it if they take exception to a judge's decision. However, some argue that it will put the government under overwhelming political pressure if a judge issues a declaration that a particular act of parliament is not compatible with human rights.

That power, together with the power to strike down secondary legislation such as rules and regulations drawn up by ministers under acts of parliament, will tilt the present balance of power in the judges' favour.

In addition, the judges will be drawn into making "much more obviously political decisions" in judicial review cases challenging the decisions of ministers and public bodies, the appeal court judge, Sir Henry Brooke, acknowledged last week. He told a conference of the Howard League for Penal Reform that judges would pay appropriate deference to ministers. But he pointed out that for the first time judges would have to decide whether government interference with a human right was "necessary in a democratic society" — a clearly political value judgment.

How active will the English judges be in applying the convention? In Canada, which adopted a similar charter of rights in 1982 — producing, one senator predicted at the time, in words later adopted by the Scottish judge, Lord McCluskey, "a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers" — the supreme court has struck down a number of statutes. Its rulings have been described by some critics as "a criminal's charter".

In Scotland, the human rights convention has been partly in force for more than a year as a result of devolution. Members of the executive, including the lord advocate, responsible for prosecutions, are subject to it, but other public bodies will not be covered until next month. Scottish judges have not let many challenges through — only 17 of 587 have succeeded — but although they have used the new powers sparingly they have readily embraced human rights principles.

One decision, relying largely on Canadian supreme court case law, has put motoring prosecutions relying on admissions by suspects that they were behind the wheel into limbo, at least until the result of an appeal. Another, that part-time sheriffs were not independent enough of the executive to guarantee a fair trial, threw the court system into disarray. A third, which had little publicity south of the border, has put question marks over the fairness of the Scottish planning system.

Ishbel Smith, of the Edinburgh law firm McGrigor Donald, said: "The decisions show that Scottish judges are not just aware of the convention rights but are prepared to apply them to their full potential, no matter what the consequences." Early indications from the cases which have been brought in the run-up to October 2 are that English judges are taking a fairly conservative line, at least in criminal cases.

As the judges are drawn further into political controversy the demand for reforms in the way they are appointed is bound to increase. At the same time pressure is likely to grow to establish a human rights commission for England and Wales — similar to the equal opportunities commission and the commission for racial equality — to help individuals bring cases under the new act and to help spread a human rights culture. Northern Ireland already has a human rights commission.

> Judges will be drawn into making 'much more obviously political decisions'

The government has not ruled out setting up such a commission but ministers say they are yet to be convinced it is needed. The arrival of incorporation next month is likely to hasten its creation.

Strasbourg cases that changed UK law

Ten significant rulings from Strasbourg:

1 Prisoners won the right to consult a lawyer, write to an MP or a newspaper, and to sue the Home Office without having to have permission of the home secretary. 1975.
2 Certain interrogation techniques used at the RUC Castlereagh detention centre in Northern Ireland were banned after Dublin brought a case alleging torture and ill treatment. 1977.
3 Birching outlawed in the Isle of Man. 1978.
4 Sunday Times thalidomide ruling lifted a high court gag on publishing damning reports about the effects of a drug on unborn children and led to reform of contempt of court law. 1979.
5 Law changed to make it easier to opt out of joining a trade union. 1981.
6 Corporal punishment in schools was ruled not to be degrading but there had been a failure to respect the philosophical convictions of the mothers of two Scottish boys who were opposed to such beatings and brought the case. 1982. Caning in all state schools was banned in 1986 as a result.
7 Stricter controls on telephone tapping were introduced after a police operation which used unauthorised taps against an antiques dealer, James Malone. 1984.
8 It was ruled that the British government had violated freedom of expression by banning the Guardian, Observer and Sunday Times from publishing extracts from Peter Wright's book Spycatcher. The press played "the vital role of public watchdog". 1991.
9 Government lifted the ban on gays and lesbians serving in the armed forces after it was ruled to be illegal under the right to privacy and to family life. 1999.
10 Bulger case ruling. Children charged with murder or manslaughter will never again face the full ceremony and publicity of an adult jury trial after the court ruled that Jon Venables and Robert Thompson had not received a fair trial because as juveniles they could not have understood the proceedings, and it was wrong for the home secretary to decide their final sentence. 1999.